ARAB-MALAYSIAN FINANCE BHD v. RAZSHAH ENTERPRISES SDN BHD

HIGH COURT MALAYA, IPOH
CHE RUZIMA GHAZALI JC
[ORIGINATING SUMMONS NO: 31-653-2003]
24 APRIL 2015

LAND LAW: *Sale of land – Order of court – Land charged to bank as security for loan – Default in repayment of loan – Whether cause to contrary shown – Whether loan agreement varied – Whether repayment period extended – Whether chargor allowed to redeem lands in staggered manner – Whether plaintiff breached agreement in refusing to allow redemption of lands – Whether interest charges justified – Whether chargor could counterclaim for damages – National Land Code, s. 256*

The plaintiff had granted a loan facility to the borrower, a director of the defendant, secured through a legal charge over the defendant's lands. Upon the borrower's default in repayment of the loan, the plaintiff issued a letter extending the expiry date of the loan period from 7 July 1985 to end of September 1986 ('the first extension letter'). Upon the borrower breaching the loan agreement for the second time, the plaintiff issued another letter extending the loan period to 31 December 1987 ('the second extension letter'). The plaintiff's claim herein was for an order for sale of the lands under s. 256 of the National Land Code to satisfy the sums due. The defendant did not deny that the borrower delayed in the repayment of the loan but contended that the loan agreement had been varied by the plaintiff and under the new terms, there were two main changes, namely: (i) the period of the repayment of the loan had been extended from 6 July 1985 to 31 December 1987; and (ii) the defendant was allowed to redeem the said lands lot by lot. It was the defendant's contention that, before the end of the renewed contractual period, the borrower had paid all outstanding interest as allowed to the plaintiff and had made large payments of the principal sum to the plaintiff. The defendant further contended that with the large payments, the defendant was eligible to redeem part of the said lands. However, the plaintiff had failed or refused to release any lot to the defendant as agreed under the new terms. The defendant also contended that the plaintiff imposed four unjustified interest charges on the defendant, namely by: (i) imposing late payment charge or overdue interest without giving a written demand to the borrower as provided under the loan agreement; (ii) increasing the interest for the loan from 15% to 15.5% per annum with effect from 1 May 1985 without any written notice as required under the loan agreement; (iii) increasing the interest for the loan from 15% to 24% per annum in July 1985 without any written notice as required under the loan

agreement; and (iv) imposing compound interest on the borrower the moment the borrower reduced the balance outstanding below the loan amount on 24 December 1986, which was not provided under the loan agreement. The issues to be decided by the court were: (a) whether the defendant as a chargor was in breach of the loan agreement by defaulting payment; and (b) whether the defendant had shown the existence of cause to the contrary which could deny an order for sale. The defendant counterclaimed alleging that the plaintiff had breached the loan agreement and as the result, the defendant suffered damages. The defendant also alleged that the plaintiff had committed the tort of negligence against the borrower or the defendant.

Held (dismissing plaintiff's claim and allowing defendant's counterclaim with costs):

(1) The original term loan agreement had been amended by both extension letters. The first extension letter not only allowed the borrower to extend the repayment period, but it also gave an option to the borrower to redeem the title of the said lands. The original term loan agreement had been amended by both extension letters. The second extension letter operated retrospectively, back-dating the interest rate and the rate for late payment charges. This had further confirmed that the due date of repayment was extended from 7 July 1985 to 31 December 1987 and supported the fact that there was no break in the tenure of the loan. (paras 49, 51 & 52)

(2) The option to redeem title in the first extension letter which was renewed by the second extension letter was worded in such a way that the borrower could redeem the title in a staggered manner. This indicated that the borrower could redeem the title of the lands lot by lot and that the redemption sum would reduce the balance of the loan equally and accordingly. (para 53)

(3) The titles charged to the plaintiff by the defendant were merely for the purpose of security. The plaintiff could not withhold the titles when the borrower or the defendant chose to enforce their right to redeem. The plaintiff's resistance to the borrower's request amounted to a total failure of consideration which went to the root of the loan agreement. Since the plaintiff had breached its own agreed fundamental term of amended loan agreement, the borrower had all the right to treat the loan agreement as having been illegally terminated by the plaintiff. (para 69)

(4) As the termination of the loan agreement was within the extended due date, the termination was good in law and the parties were bound by it. The defendant had no obligation to pay the amount as demanded by the plaintiff in the statutory notice in Form 16D. However, the borrower

and the defendant were still liable to pay the amount of the outstanding loan calculated up to the termination of the agreement, 11 December 1987. (paras 70 & 71)

(5) The overdue interest could not be lumped together in the final notice of demand which included all other monies claimed. The provision of the late payment charge or overdue interest in the loan agreement was separated with other charges. It stood alone and had a specific means as how to enforce or to amend it. The plaintiff had to follow strictly the means provided. The borrower's obligation to pay the late payment charge only arose when demanded by the plaintiff. If the late payment charge was to be included in the final notice of demand, the actual figure of the late payment charge had to be spelt out separately. As this was not done, the borrower was deprived of the specific demand notice on the actual amount that he was required to pay for the late payment charges. In the circumstances, the plaintiff had failed to prove the amount claimed, whereas, the defendant had satisfied the court of the existence of cause to the contrary. The defendant had demonstrated that the plaintiff had failed to meet the conditions precedent for the making of an application for an order for sale. (paras 76 & 77)

(6) The plaintiff's breach of the fundamental term of the loan agreement had a direct impact on the defendant. The defendant suffered substantial loss due to the plaintiff's failure to fulfil the defendant's request to redeem title of the said lands. Therefore, defendant was entitled to general damages for the said breach of contract. (para 90)

Case(s) referred to:
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Yew Kim Tan v. Mallika I/K S Subramaniam & Anor [2010] 2 CLJ 606 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
National Land Code, s. 256
Rules of Court 2012, O. 15 r. 2
Rules of the High Court 1980, O. 18 r. 19, O. 28 r. 8(1), O. 83 r. 3

For the plaintiff - Vijay Kumar (Natarajan & V Ravindran with him); M/s Kumar, Jaspal, Quah & Aishah
For the defendant - Asri (Mark Foong & Raam Kumar with him); M/s Asri-Chek Ming & Co

Reported by Amutha Suppayah

A

JUDGMENT

Che Ruzima Ghazali JC:

Introduction

B **[1]** The plaintiff granted a loan facility to one Wan Mokhtar bin Wan Endut (the borrower) secured through a legal charge over the defendant's lands. The plaintiff sued the defendant to recover the outstanding instalments owed by the borrower and to enforce the charge. On the other hand, the defendant put a counterclaim against the plaintiff.

C **[2]** The plaintiff is at all material time, a licensed finance company incorporated in Malaysia and presently known as Am-Finance Bhd.

[3] The defendant is a company incorporated in Malaysia, owner and the registered proprietor of 53 pieces of land held under qualified title deeds, HS(D) 6975/81 to 7027/81 Lot No PT 37692 to Lot No PT 37744, all in D the Mukim of Ulu Kinta, Perak (the said lands).

Facts Of The Case

[4] This case had a very long and chequered history. It started with a loan agreement dated 6 July 1983, where the plaintiff agreed to grant a term loan of RM2.4 million (the loan) to the borrower upon the terms and conditions E agreed by both parties. At the material time, the borrower was one of the directors and also the shareholder of the defendant.

[5] On 16 June 1983, the defendant stood as a guarantor to the loan and agreed to execute a first legal charge over the said lands. The charge was F registered at the Registry of Titles, Perak *vide* Charge Presentation No. 17080/83, Jilid 1508, Folio 38 (the said charge) on 7 July 1983 in favour of the plaintiff to secure repayment of the loan that may become payable by the borrower under the said charge.

[6] On 8 July 1983, after the said charge was duly registered, the plaintiff G proceeded to disburse the loan of RM2.4 million to the borrower. The borrower was obliged, under the terms of the said loan, to service the monthly interest payments and was required to repay the principal in one lump sum within two years from the date of the drawdown, and that would be by 8 July 1985.

H **[7]** It was claimed that the borrower had defaulted and was indebted to the plaintiff in a sum in excess of RM2.7 million as principal and interest on or about 8 July 1985. The borrower had only paid the sums of RM115,000 to the plaintiff by three instalments (RM30,000 on 7 December 1984, RM60,000 on 6 April 1985 and RM25,000 on 21 May 1985).

I

[8] The plaintiff agreed to restructure the repayment of the principal sum upon the request of the borrower. By letter dated 7 October 1985, the terms of payment were revised and alternatively the borrower also offered to redeem the titles subject to the borrower updating all the interests outstanding.

[9] However, the borrower failed to comply with the restructure agreement. With this non-compliance, the arrangement contained in the letter dated 7 October 1985 lapsed.

[10] By letter dated 12 May 1986 addressed to the borrower and the defendant, the plaintiff through its solicitors demanded payment the sum of RM3,215,129.18 being the balance outstanding calculated as at 18 March 1986.

[11] The following payments were then received by the plaintiff which were paid into the borrower's account on the relevant dates:

- RM100,000 on 31 October 1986
- RM200,000 on 6 November 1986
- RM300,000 on 25 November 1986
- RM150,000 on 15 December 1986
- RM500,000 on 24 December 1986
- RM300,000 on 2 January 1987
- RM150,000 on 28 February 1987
- RM150,000 on 30 March 1987
- RM250,000 on 26 May 1987
- RM200,000 on 15 June 1987

[12] The borrower requested to extend the repayment due date of the principal outstanding and the plaintiff by letter dated 10 July 1987 agreed to the borrower's request. The borrower had to pay one lump sum repayment of principal balance on 31 December 1987 or upon redemption of the shop house titles whichever is earlier. The revised terms were expressly subject to the borrower updating all the outstanding interests.

[13] By the same letter dated 10 July 1987, the plaintiff also gave notice to the borrower in regard to the following changes, that:

(a) the interest rate has been reduced from 15% per annum on monthly rests to 4% per annum above the plaintiff's base lending rate with effect from 1 May 1987; and

(b) the damages on late payment has been reduced from 0.05% to 0.0493% per day with effect from 1 February 1987 and that with effect from 1 July 1987 it would be computed at 3% above the prescribed rate.

[14] The borrower made the last payment to the plaintiff in the sum of RM100,000 on 23 November 1987.

[15] By a letter dated 29 April 1988, the plaintiff's solicitors demanded payment from the defendant the sum of RM1,218,629.84 owing as at 31 March 1988 together with interest at 14% per annum from 1 April 1988. It was said that the defendant received the letter of demand on 8 May 1988.

[16] The plaintiff claimed that the defendant failed not only to effect the full payment of the amount outstanding but had also committed a breach of the terms of the said charge. The said breach continued for a period of more than seven days and this prompted the plaintiff through its solicitors to cause a statutory notice in Form 16D dated 27 May 1988 to be issued requiring the defendant to remedy the said breach within a further period of seven days from the service thereof, failing which an order for sale would be applied for. On 30 May 1988, the Form 16D notice was served on the defendant.

[17] It was said that the defendant failed to remedy the said breach. By virtue of O. 83 r. 3 of the Rules of the High Court 1980 (RHC), the plaintiff advanced the following particulars:

(a) the amount of the advance - RM2,400,000

(b) the amount of repayment - RM2,515,000

(c) the amount of interest or instalments in arrears as at 30 September 2003 - RM4,340,343.68

(d) the amount remaining due under the said charge as at 30 September 2003 - RM4,473,198.58

(e) the interest that is due for the months of

- October 2003 - RM522.93
- November 2003 - RM522.93
- December 2003 - RM522.93

[18] Following from all these, the plaintiff sought an order that the 53 land titles owned by the defendant which was charged in favour of the plaintiff be sold under the National Land Code (Act 56) in order to satisfy the sums that were said to be due to the plaintiff.

[19] The plaintiff and the defendant started a very long period of legal battle. On 9 July 1988 the plaintiff commenced an action through Originating Summons No. 31-653 of 1988 in the High Court at Ipoh (the said OS) for an order for the sale of the said lands.

[20] On 10 May 1991, Peh Swee Chin J (as he then was) gave an order for sale to the said OS.

[21] The defendant appealed against the said order.

[22] On 27 April 1992 the Supreme Court in Civil Appeal No. 02-215-1991 set aside the order made by Peh Swee Chin J and ordered the matter be remitted back to High Court to be heard before another judge. A

[23] On 17 July 1992 the defendant filed counterclaim against the plaintiff.

[24] The said OS was heard by the late Mokhtar Abdullah J (as he then was). On 14 December 1992 the learned judge found that there was a 'cause to the contrary' and that an order for sale should not be granted at that stage of the proceedings. The learned judge also directed, *inter alia*, that the proceedings to be continued "as if the cause or matter had been begun by writ" pursuant to O. 28 r. 8(1) of the RHC. No appeal filed by the plaintiff against the said decision. B C

[25] On 16 July 1998, Pajan Singh Gill J (as he then was) ordered, *inter alia*, that the statement of agreed facts and the statement of the issues in dispute be filed together with the written submissions and that all these must be exchanged between the parties. D

[26] On 30 June 1999, Pajan Singh Gill J directed counsel on both sides to address the issue of whether the matter was *res judicata* and could not be heard any further.

[27] On 29 July 1997, Pajan Singh Gill J held that the doctrine of *res judicata* applied and he dismissed the plaintiff's application for an order for sale and he too dismissed the defendant's counterclaim. Aggrieved by the said decision, both parties lodged an appeal. E

[28] On 24 September 2003, the Court of Appeal dismissed both the appeals and remitted both the plaintiff's writ action and the defendant's counterclaim to the High Court for case management on 1 December 2003 with ancillary directions for parties to file and serve their respective pleadings. F

[29] From the records, the plaintiff filed its statement of claim dated 6 October 2003. The defendant filed its statement of defence and counterclaim dated 21 October 2003. The plaintiff then filed its reply and defence to the counterclaim dated 11 November 2003. G

[30] By way of summons in chambers dated 17 December 2003, the plaintiff sought to strike out the counterclaim of the defendant under O. 18 r. 19 of the RHC 1980 and under the inherent jurisdiction of the court. H

[31] The Senior Assistant Registrar dismissed the plaintiff's application to strike out the defendant's counterclaim.

[32] On appeal, the High Court allowed the plaintiff's application to strike out the defendant's counterclaim. I

[33] By an order dated 17 March 2008, the Court of Appeal allowed the defendant's appeal and the defendant's counterclaim was restored before the High Court.

[34] Dissatisfied with the decision, the plaintiff further appeal to the Federal Court. By the judgment dated 12 January 2010, the Federal court dismissed the plaintiff's appeal. The apex court expressed their utmost concern over the protracted litigation and the course of action taken by the parties. An order for early trial was also given for this court to hear the case until its final conclusion.

The Main Claim

Plaintiff's Claim

[35] The plaintiff's claim is based on the notice issued under the Form 16D, National Land Code (NLC), demanding the sum of RM1,218,629.84 due as at 31 March 1989.

[36] The plaintiff proved that the borrower failed to pay the full loan amount and the defendant has also admitted to the amount owing. The amount claimed by the plaintiff corresponded to the borrower's request for the reduction of the interest charged.

[37] The interest charged is a compounded interest as the term 'monthly rest' was used in the loan agreement. As regards to the overdue interest or the late payment, it was clearly spell out in the provision of the loan agreement. The plaintiff is entitle to claim the same.

[38] As regards to the partial redemption of the titles, the borrower is fully aware that the concession lapsed before the payments was made. Alternatively, in any event, the plaintiff is not required in law to perform its obligation until and unless the borrower or the defendant first fully perform their promise before they can demand the release of the titles.

[39] Since the borrower did not rectify his breach and continued to be in default and neither did the defendant comply with the statutory demand in Form 16D, the plaintiff seeks to foreclose the said lands and asking for an order for sale of the said lands by public auction under NLC to satisfy the sum due.

Defendant's Contention

[40] Defendant did not deny that the borrower delayed in the repayment of the loan due to the financial problem. However, the loan agreement had been varied by the plaintiff upon request of the borrower. Under the new terms, there are two main changes, namely:

(i) the period of the repayment of the loan had been extended from 6 July 1985 to 31 December 1987; and

(ii) the defendant was allowed to redeem the said lands lot by lot, on the basis of a redemption sum of RM65,000 per lot.

[41] Before the end of the renewed contractual period, the borrower:

(i) paid all outstanding interest as allowed to the plaintiff; and

(ii) made large payments of the principal sum by way of paying to the plaintiff a total amount of RM2.3 million. With that large payments, the defendant is eligible to redeem part of the said lands.

However, even requested by the borrower or the defendant, the plaintiff failed or refused to release any lot to the defendant as agreed under the new terms.

[42] Consequentially, after waiting in vain for a few days to allow the plaintiff reasonable time to act according to the new term of agreement, the borrower personally delivered a letter of demand dated 27 November 1987 to the plaintiff. The borrower gave notice of demand to the plaintiff that unless the redeemed titles were released within 14 days from the date of the letter, he would regard the loan agreement as being illegally terminated by the plaintiff and treat himself as being discharged from further obligation under the loan agreement.

[43] Besides that, the defendant contended that the plaintiff imposed four unjustified interest charges on defendant, namely by:

(i) imposing late payment charge or overdue interest without giving a written demand to the borrower as provided under section 3.06 of the loan agreement;

(ii) increasing the interest for the loan from 15% to 15.5% per annum with effect from 1 May 1985 without any written notice as required under section 3.04 of the loan agreement;

(iii) increasing the interest for the loan from 15% to 24% per annum in July 1985 without any written notice as required under section 3.04 of the loan agreement. Such high interest is far in excess of the average interest rate charge by finance company base on the report of Bank Negara for the relevant period; and

(iv) imposing compound interest on the borrower the moment the borrower reduced the balance outstanding below the loan amount of RM2.4 million on 24 December 1986, in which was not provided under the loan agreement.

[44] Finally, the defendant argued that the plaintiff is estopped from claiming that the borrower had breached the loan agreement. The High Court in Ipoh on 14 December 1992 refused to grant an order for sale of the said lands on the ground that 'cause to the contrary' had been proven. No appeal filed by the plaintiff against that decision.

A **Issue**

[45] The main issue to be decided by this court is that, whether the borrower and hence the defendant as a chargor in breach of the loan agreement by defaulting payment and the court shall order the sale of the said lands or the defendant has satisfied the court of the existence of cause to the
B contrary which can deny the order for sale.

Court's Analyses and Findings

[46] The plaintiff's claim against the defendant, a chargor, is for an order for sale to sell the said lands by public auction under s. 256 of the NLC to
C satisfy the sum due to the plaintiff. For easy reference, the provisions of s. 256 of the NLC are as follows:

> 256 Application to Court for order for sale
>
> (1) This section applies to land held under-
>
> D (a) Registry title;
>
> (b) the form of qualified title corresponding to Registry title; or
>
> (c) subsidiary title,
>
> and to the whole of any divided share in, or any lease of, any such land.
>
> E (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the Court shall order the sale of the land
> F or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[47] Supreme Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 held that:

> 'Cause to the contrary' within s 256(3) of the Code might be established
> G only in three categories of cases:
>
> (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code;
>
> (ii) when a chargor could demonstrate that the chargee had failed to
> H meet the conditions precedent for the making of an application for an order for sale; and
>
> (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

I With this basic principle in mind, the evidence tendered will be analysed to determine the plaintiff's claim and the defendant's cause to contrary.

The Loan Agreement

[48] It is not disputed that in the beginning, the defendant entered into a 'term loan' agreement with the plaintiff. Specific amount of RM2.4 million was borrowed and to be paid within two years period from 8 July 1983 to 7 July 1985. The borrower defaulted in the repayment of the loan. Upon request by the borrower, the plaintiff agreed and issued a letter dated 7 October 1985 (at p. 47 & 48 Bundle B) which extended the expiry date of the loan period from 7 July 1985 to end of September 1986 (first extension letter). However, the borrower was unable to repay the loan during the extended period. Thus, the borrower had breached the loan agreement for the second time but the plaintiff did not take any action to foreclose the said lands. Instead, upon the borrower's request, the plaintiff issued another letter dated 10 July 1987 (at p. 426 & 426a Bundle D) stated that the plaintiff's Board of Directors agreed to another extension to the borrower to repay the loan before 31 December 1987 (second extension letter).

[49] It is pertinent to note that, the first extension letter not only allow the borrower to extend the repayment period, but it also give option to the borrower to redeem the title of the said lands. Part of the first extension letter provided as follows:

> In response to your request, we are pleased to inform you that our Board has agreed to restructure the principal repayment for the above facility. The lump sum repayment scheduled on 8th July 1985 is to be revised as follows:
>
> (i) Monthly servicing of interest.
>
> (ii) Six principal repayments as per schedule below:

Principal Repayment ($)	Month End
200,000	November 1985
500,000	January 1986
500,000	March 1986
500,000	May 1986
500,000	July 1986
200,000	September 1986

> or upon redemption of title whichever is earlier. In the event, any redemption is applied the subsequent principal repayments shall be reduced equally and accordingly.
>
> The redemption sum of shop houses are at $65,000 per title.

[50] No doubt that the borrower did not comply with the obligations as contained in the plaintiff's first extension letter. With this non-compliance, the arrangement contained in the letter lapsed and it became unenforceable.

But, then, the plaintiff issued the second extension letter which specifically refer to the letter dated 28 May 1983, ie, the loan offer letter and the first extension letter. Part of second extension letter is as follows:

> RE: TERM LOAN OF $2.4M
>
> We refer to our Letter of Offer dated 28th May 1983 and thereafter letter dated 7th October 1985.
>
> In response to your further request, we are pleased to inform you that our Board has agreed to extend the repayment due date of the principal balance outstanding on the above facility as follows:
>
> (i) Monthly servicing of interest on principal balance outstanding.
>
> (ii) One lump sum repayment of principal outstanding on 31st December 1987 or upon redemption of shop house titles whichever is earlier.
>
> The redemption sum of shop house titles shall be at $65,000.00 per title.

The second extension letter clearly shows that the plaintiffs' Board of Directors agreed to extend the repayment due date of the loan and again offer the same option to the borrower to redeem the title of the said lands as in the first extension letter. It also means that whatever terms offered in the first extension letter is extended except for the repayment of the loan had to be paid up in one lump sum.

[51] It seems that the first extension letter extended the loan period to the end of September 1986. The subsequent second extension letter which clearly referred to the first extension letter further extended the repayment due date of the principal balance outstanding to 31 December 1987. The words "our Board has agreed to extend the repayment due date" used in the second extension letter shows that there was no break of the repayment period from end of September 1986 to 31 December 1987. In other words, the phrase used shows that the second extension letter had merely extended the last date of repayment from end of September 1986 to 31 December 1987. The effect of such extension meant that the borrower is also allowed to redeem the titles within the period from end of September 1986 to 31 December 1987. From the facts, it is crystal clear that the original term loan agreement had been amended by both extension letters.

[52] Besides that, the court also consider the defendant's counsel's submission on the point that the second extension letter operated retrospectively. The sixth paragraph of the second extension letter stated that interest rate had been reduced from 15% to 13.75% with effect from 1 May 1987 which is approximately two months before 10 July 1987 (the date of the second extension letter). The seventh paragraph stated that damages on late payments were reduced from 0.05% per day to 0.0493% per day with effect from 1 February 1987 which was approximately five months before

10 July 1987. The back-dating of the interest rate and the rate for late payment charges to the period between end of September 1986 and 10 July 1987 further confirms that the due date of repayment was extended from 7 July 1985, the original due date, to 31 December 1987. It also supported the fact that there is no break in the tenure of the loan.

[53] As regards to the option to redeem title of the said lands, this new agreed terms has to be read between the lines. The option to redeem title in the first extension letter which was renewed by the second extension letter was worded in such a way that the borrower can redeem the title in a staggered manner. The words, "In the event, any redemption is applied the subsequent principal repayments shall be reduced equally and accordingly" indicates that the borrower can redeem the title of the said lands lot by lot and that the redemption sum will reduce the balance of the loan equally and accordingly.

[54] This interpretation is supported by the fact that the outstanding loan as at the date of the first extension letter is RM3.1 million. Since the title of the said lands to be redeemed was at RM65,000 per title, the total redemption sum for 53 titles will be RM3,445,000.

[55] The borrower then made a huge total payment of RM2.3 million between 31 October 1986 to 15 June 1987, before the due date given under the second extension letter, ie, 31 December 1987. The outstanding balance of the loan, according to the plaintiffs' calculation at that time is merely RM1,218,629.84. If the plaintiff argues that the borrower had to redeem the whole title at RM65,000 per title, then the total redemption sum for 53 titles will be RM3,445,000, a huge surplus if compared to the outstanding balance.

[56] Therefore, the most probable interpretation as to the option given by the plaintiff in regards to the redemption of the title is that the borrower or the defendant is allowed to redeem the title of the said lands, lot by lot. By simple logic, when any redemption is applied lot by lot, the subsequent principal repayments shall be reduced equally and accordingly.

[57] Besides that, the evidence given by the borrower supported the defendant's version on the redemption of title. In his witness statement, the borrower (SD1) disposed that:

Q14: What did you do after May 1985?

A: I realised that I was unable to comply with the terms of the loan agreement. So I went to see the manager of the plaintiff's lpoh Branch, one Mr. Ong Leong Huat.

Q15: What did you tell the Plaintiffs lpoh branch manager?

A: I told the branch manager of the Plaintiff's lpoh branch that I needed more time to settle the loan and I also requested him to allow me to redeem the charged 53 titles on individual title basis.

In addition I also suggested RM46,000.00 as the amount of redemption sum for each title .The reason for me to suggest RM46,000.00 as redemption sum per title was because RM2.4 million divided by 53 titles equal to RM45,283.00 per title

Q16: Did you tell anything else to Mr. Ong Leong Huat?

A: Yes. I also told Mr. Ong that during that time the Defendant was developing a residential project called Taman Puteri Lindungan Bulan which was situated in Jalan Pasir Puteh, lpoh. I told him that the Defendant was expecting to obtain income from this development to pay for the said loan. I had also brought along documents to show to Mr. Ong to prove my claim about the Defendant's said residential development.

Then the plaintiff agree to extend the repayment due date as in the 1st extension letter which was accepted by the borrower. The borrower agree that he did not make any payment thereafter but he did request for more time to settle the loan.

Q23: What did you do then?

A: I went to see Mr. Ong Leong Huat in September 1986 and requested him to give me more time to repay the loan and the interest. I explained to him that there was some delay of collection of sale proceeds from the Defendant's residential development project in Taman Puteri Lindungan Bulan. However, I assured him that the Defendant would definitely be receiving incomes from the residential development in the following few months.

Q24: What was the response of the plaintiff's lpoh Branch manager?

A: Mr. Ong Leong Huat accepted my assurance and told me not to worry about the deadline mentioned in the Plaintiff's letter dated 7.10.1985. He assured me that the Plaintiff will extend the time limit for repayment to the end of 1987. He instructed me to make as much payment as I could to the bank as soon as possible. He told me that my payments would first be used to settle the outstanding interest and that once the outstanding interest was settled the balance of my payments will go to set-off against the principal sum of RM 2.4 million and the Individual titles will be redeemed and released to the Defendant on the basis of RM 65,000.00 per title for the initial repayment of principal and that subsequent repayment of principal will involve a reduced amount of the redemption sum as stated in the plaintiff's letter dated 7.10.1985.

[58] The borrower said that he was grateful with Mr Ong Leong Huat's (Mr Ong) promise and made ten huge payments from October 1986 to June 1987 amounted to RM2.3 million. Despite Mr Ong's promise, the plaintiff did not release any title to the borrower or the defendant. According to the borrower's calculation, his fifth payment of RM500,000 on 24 December 1986 settled all outstanding interest and part of the principal sum had been reduced. Therefore, the borrower or the defendant was entitled to redeem part of the title on the basis of RM65,000 per title.

[59] The borrower also said that he did many times requested Mr Ong to release some title as promised. Mr Ong kept on telling the borrower that he was arranging with the head office to release a portion of the titles in proportion to the amount of money paid. After the tenth payment, the borrower received the second extension letter which extends the due date of the repayment period to 31 December 1987.

[60] The borrower then wrote an undated letter referring to the second extension letter which was stamped with the word 'received' by the plaintiff on 6 August 1987 (p. 369 Bundle D). In that letter, the borrower officially asking the plaintiff to release the titles in accordance with the amount of money that was paid to reduce the principal sum of RM2.4 million.

[61] On 9 September 1987, upon suggestion by Mr Ong, the borrower went to see the then managing director of the plaintiff, Encik Azlan Zainol (En Azlan), for the purpose of following up the redemption claim. The borrower specifically told En Azlan that the defendant wanted to, but would not be able to develop the 53 lots of land if the titles were not discharged and released. En Azlan only listens to the borrower's explanations and told him to wait for a reply from the plaintiff's Ipoh branch office.

[62] There is no positive answer from the plaintiff. The borrower had finally written a strongly worded letter of demand dated 27 November 1987 (p. 795 Bundle E, tendered and marked as exh. D4) asking for the release of titles within 14 days from the date of the letter and he would regard the loan agreement as being illegally terminated by the plaintiff and treat himself as being discharged from further obligations under the loan agreement.

[63] The evidence narrated by the borrower clearly shows the sequence of events that happened between him and Mr Ong, the then Ipoh Branch Manager. The evidence related to the request for the redemption of titles was not shaken even though the borrower was heavily cross-examined by the plaintiff's counsel.

[64] The plaintiff's main witness is Mr Gan Kong Meng (SP2), a Senior Manager Group Loan Rehabilitation. He joined the bank in 1996. The plaintiff tried to put forward an argument that the borrower, after having made the payments, never requested for the release of titles. The plaintiff refer to a 'contact report' dated 9 September 1987 purportedly made by En Azlan (p. 427 Bundle D). This document is classified under Part B, which means that the attendance of the maker of the document to verify and authenticate the content is required. However, En Azlan was not called to give evidence. Instead SP2 attempted to give his own interpretation of the 'contact report'.

[65] According to SP2, since the document mentioned that the purpose of En Azlan's meeting with the borrower was to discuss the borrower's request to reduce the overdue interest rate, it therefore showed that the borrower had

never made any request as to the release of the titles. With due respect, SP2's was not present at the said meeting. Therefore, the interpretation of the content of the 'contact report' is merely a hearsay evidence.

[66] It must be emphasised that SP2 has no personal knowledge as to the request made by the borrower. He cannot give credible evidence as to the request made by the borrower. Rebuttal evidence can be best given by Mr Ong, the then plaintiff's Ipoh Branch Manager but the plaintiff failed to call Mr Ong.

[67] Federal Court in the case of *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949 at pp. 967 & 968 held that:

> ... Unless this positive testimony, which went through the rigours of a trial is contradicted this failure to do so must mean that the appellant's evidence had been successfully established, or taken as admitted by the opposing party.
>
> [28] By analogy, Gopal Sri Ram when evaluating an unrebutted affidavit in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 at p. 614; [1995] 1 MLJ 281 at p. 286 had this to say:
>
> > Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.
>
> [29] In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 the appellant had commenced proceedings to enforce a trust she claimed had arisen in her favour. The first respondent did not attend court, give evidence or take part in the case. The appeal was allowed and the orders of the High Court and Court of Appeal were set aside. On the issue of the effect of the non-presence of the first respondent in court, Gopal Sri Ram FCJ had remarked:
>
> > In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true... In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.

The borrower's evidence as to his right or the defendant's right to redeem the titles after the substantial amount was paid to pay the loan and the borrower's establish fact on the requests made to redeem the titles by the borrower or the defendant stand unchallenged or unrebutted. It is the duty of this court to have accepted the borrower's evidence as true in the absence of any evidence from the plaintiff going the other way.

[68] Besides that, the defendant's counsel in his submission did refer to the record of proceedings of the then Supreme Court in Rayuan Sivil No. 02-215-91. It is worth to note that on 27 April 1992 when setting aside the order made by Peh Swee Chin J concerning this case and ordered that the matter be remitted to the High Court, the Supreme Court had taken note of the facts conceded by the plaintiff's counsel, namely, that RM2.5 million had been paid to the plaintiff for interest and principal and that the redemption sum was RM65,000 per shop lot title. The said note of proceedings of the Supreme Court is produced at p. 444 of Bundle D.

[69] Thus, plaintiff's action of denying the borrower's request for the redemption of the titles which was agreed upon, give the right to the borrower to act. The titles charged to the plaintiff by the defendant are merely for the purpose of security. The plaintiff cannot withhold the titles when the borrower or the defendant chose to enforce their right to redeem. The plaintiff's resistance to the borrower's request amounted to a total failure of consideration which went to the root of the loan agreement. Since the plaintiff had breached its own agreed fundamental term of amended loan agreement, the borrower has all the right to treat the loan agreement as having been illegally terminated by the plaintiff. The Court of Appeal in the case of *Yew Kim Tan v. Mallika I/K S Subramaniam & Anor* [2010] 2 CLJ 606; [2011] 5 MLJ 589 did discussed the position of the parties who flouted the agreement. Raus Sharif JCA (now PCA) in delivering judgment of the court held that:

> It is trite law that in every contract, there are some terms that are fundamental importance and others of less importance. Where the terms that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligation under it. But where the obligation that has been breached is only a subsidiary in nature, the innocent party may not treat himself as being free of his obligation under the contract, although he may sue and recover damages for the non-performance of the subsidiary term (see *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675 (CA)).

[70] It is also pertinent to note that the borrower's demand letter exh. D4 was dated on 27 November 1987, which is before the expiry of the second extension letter's due date. Even after considering the 14 days given under the notice, the termination of the loan agreement is still within the extended due date. The termination is good in law and the parties are bound by it.

[71] Since the defendant had terminated the loan agreement on 11 December 1987 (14 days after the demand letter D4), the defendant has no obligation to pay the amount as demanded by the plaintiff in the statutory notice in Form 16D dated 27 May 1988. However, the borrower and the defendant is still liable to pay the amount of the outstanding loan calculated up to the termination of the agreement that is on 11 December 1987. Section 66 of the Contracts Act 1950 provided that:

A When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Interest

B **[72]** The borrower and the defendant also claimed that the plaintiff imposed four unjustified interest charges on defendant. The plaintiff imposed late payment charges or overdue interest without giving a written demand to the borrower, increased the interest without any written notice in two occasions and imposed compound interest on the borrower.

C **[73]** Upon perusing the evidence tendered, the court is in agreement with the plaintiff's contentions that the increase of the interest rate in the two occasions were either notified by the plaintiff to the borrower or the variation of interest is based on the request of the borrower.

D **[74]** As regards to the compound interest charged, the loan agreement clearly mentioned that the borrower agrees to repay the loan on demand together with interest of 15% per annum on 'monthly rest'. Plaintiff's counsel refer to the Federal Court's case of *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 where Chang Min Tat FCJ explained the terms 'monthly rest' as follows:

E

> ... In *Yourell v. Hibernian Bank* [1918] AC 372, Lord Atkinson described the practice of bankers in debiting interest to an overdrawn current account periodically and thereby increasing the capital sum, which is the effect of the provision for periodical "rests", as "a usual and perfectly legitimate mode of dealing between banker and customer", though it meant securing for the bank the benefit of compound interest ...

F

Therefore, compounding of interest monthly, is the correct and proper way to calculate interest on the outstanding balance.

[75] Next, on the overdue interest charge, it is not disputed that late G payment charges or overdue interest is provided in the loan agreement. Section 3.06 of the loan agreement provided that:

> In addition and without prejudice to the powers rights and remedies herein covenanted if the Borrower shall default in the payment of any sum (whether for the principal or interest) of any other moneys herein
H covenanted to be paid on the due date, the Borrower shall on demand pay to the AMFB damages by way of additional interest at the rate of one twentieth of one per cent (1/20%) per day on such sum or other moneys at that time in arrears calculated on the daily outstanding amount or balance thereof ...

I The plaintiff argued that the final notice of demand dated 20 April 1988 issued by Messrs Nik Hussain & Partners, also makes demand for overdue interest. Since there was no challenge on the arithmetical calculation, the amount in the Form 16D and exh. P1 are both correct.

[76] The plaintiff suggested that the overdue interest can be lumped together in the final notice of demand which includes all other monies claimed. That is not correct. The provision of the late payment charge or overdue interest in the loan agreement was separated with other charges. It stands alone and has a specific means as how to enforce or to amend it. Therefore the plaintiff has to follow strictly the means provided. The borrower's obligation to pay the late payment charge only arise when demanded by the plaintiff. If the late payment charge is to be included in the final notice of demand, the actual figure of the late payment charge had to be spelt out separately. This was not done. The borrower is deprived of the specific demand notice on the actual amount that he required to pay for the late payment charges.

[77] Based on the foregoing reasons, on balance of probability, the plaintiff failed to prove the amount claimed. On the other hand, the defendant has satisfied this court of the existence of cause to the contrary. The defendant had demonstrate that the plaintiff failed to meet the conditions precedent for the making of an application for an order for sale.

The Counterclaim

Defendant's Counterclaim

[78] The defendant first filed the counterclaim on 17 July 1992 and was vigorously challenged by the plaintiff. The plaintiff's application to strike out the counterclaim was refused by the learned Senior Assistance Registrar. On appeal, the High Court allowed the plaintiff's appeal and dismissed the defendant's counterclaim. The Court of Appeal disagreed and reversed the High Court decision and that decision was then affirmed by the Federal Court.

[79] The court of Appeal in allowing defendant's appeal against the decision of the High Court make the following finding:

> Can someone else other than the defendant guarantor file the counterclaim against the plaintiff? The answer would certainly be in the negative. It was wrong to deny *locus standi* to the defendant guarantor. If the defendant guarantor has no *locus standi*, why did the plaintiff sue the defendant guarantor? The borrower cannot exist without the defendant guarantor. The latter was not a stranger to the loan agreement. (reported in *Razshah Enterprise Sdn Bhd v. Arab Malaysian Finance Bhd* [2009] 2 MLJ 102 at p. 123)

[80] On further appeal to the Federal Court by the plaintiff, the apex court agreed with the Court of Appeal's finding. Zulkefli FCJ (now CJM) in delivering judgment of the court held that:

> We are of the view the Court of Appeal in the present case had come to a correct decision upon the application of a well-established principle to the facts of the case. A further appeal to the Federal Court will be of no utility. This is because it will do nothing to clarify or refine the principle, so as to make it applicable to other situation in the future. (reported in *Ambank (M) Bhd v. Razshah Enterprise Sdn Bhd* [2010] 2 MLJ 585 at p. 595)

The decisions confirmed that the defendant as a chargor is not a stranger to the loan agreement. Therefore, the issue of the defendant's *locus standi* to file the counterclaim in this proceedings is now settled.

[81] Then, come the next hurdle. The duty to prove the counterclaim is as if the defendant is the plaintiff and the person against whom it is made a defendant. O. 15 r. 2 of the Rules of Court 2012, provided that:

> 2. (1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counter claim in respect of that matter; and where he does so he shall add the counter claim to his defence.
>
> (2) Rule 1 shall apply in relation to a counter claim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

[82] The defendant filed the re-amended counterclaim on 5 March 2013. In the re-amended claim, the defendant alleged that the plaintiff breached the loan agreement and as the result, the defendant suffered damages. The defendant also alleged that the plaintiff or its agent had committed the tort of negligence against the borrower or the defendant.

[83] The issue regarding the loan agreement had been analysed and the court's findings are as stated at paras. 48 to 70 above. The plaintiff committed a fundamental breach in refusing the borrower's request to redeem the titles. The borrower had validly terminated the loan agreement due to non-performance of the plaintiff. The only issue yet to be addressed is that, the right of the borrower to request for the title of the said lands. The plaintiff argued that the titles are registered in the name of the defendant and not the borrower. Therefore, the borrower has no right to request for the release of the titles to him personally.

[84] On appraisal of the facts, it would be apparent to note that most of the dealings between the plaintiff and the defendant done by the borrower. At the material time, the borrower is the managing director and the shareholder of the defendant. In fact, the borrower and his wife owned the defendant.

[85] The first extension letter is the clear example of the plaintiff's recognition to the relationship between the borrower and the defendant. In that letter, in respond to the borrower request, the plaintiff agree to reschedule the repayment and also made offer to redeem the titles. The

plaintiff knew that the borrower was not the owner of the titles and yet made the offer. Why? Of course the answer is that, the plaintiff recognises that the borrower is also representing the defendant.

[86] Thus, any action taken by the borrower against the plaintiff as a result of any breach of the loan agreement will also represents the defendant and any decision made by the borrower on the loan agreement will also directly give effect to the defendant. Echoing the decision of the Court of Appeal in *Razshah Enterprise Sdn Bhd v. Arab Malaysian Finance Bhd (supra)*, the borrower cannot exist without the defendant guarantor and the latter is not a stranger to the loan agreement.

[87] In the first extension letter, the plaintiff promised that the borrower, who is recognised by the plaintiff to represent the defendant or the *alter ego* of the defendant, could redeem the titles at RM65,000 per title. Within less than one year, between 31 October 1986 to 15 June 1987, the borrower paid RM2.3 million and on 23 November 1987 the borrower paid another RM100,000. From the evidence adduced, the defendant was desperate to redeem the said titles in order to proceed with its next phase of development involving the 53 commercial lots charged with the plaintiff. The borrower needed the redeemed titles to finance the construction for the shop house and commercial complex project and for sales of the buildings thereon.

[88] From the calculation made by the defendant based on the plaintiff's own figure on the outstanding loan after the huge payment made by the borrower, at least 19 titles are qualified to be redeemed.

[89] The defendant showed that, with the failure of the plaintiff to release the titles, they lost potential purchasers of the shops or commercial units to be developed due to inability to obtain end-financing from any bank (refer to exh. D5). Besides that, the defendant also could not sell the project even to prospective cash purchasers because of the unsecure purchase. Finally, the defendant will encounter tremendous problem in obtaining any bridging finance to pay the construction costs since it would not be able to charge any title to a bridging financier bank as security.

[90] The plaintiff's breach of the fundamental term of the loan agreement has a direct impact on the defendant. The defendant suffered substantial loss due to the plaintiff's failure to fulfil the defendant's request to redeem title of the said lands. Therefore, defendant is entitled to general damages for the said breach of contract.

[91] The defendant also claimed that the plaintiff committed the tort of negligence when fail to allow the redemption of the titles. However, no evidence was adduced to prove the claim. Therefore, the claim should be ignored.

[92] Having considered all evidence adduced by both parties in their entirety, on the balance of probability, the defendant has proven its counterclaim against the plaintiff.

Decision

[93] The plaintiff failed to prove its claim. The defendant succeeded to show the cause to contrary. Therefore, plaintiff's claim for order for sale is dismissed with cost.

[94] The defendant succeeded to prove that the plaintiff was in breach of the fundamental term of the loan agreement. Therefore, the defendant's counterclaim is allowed with cost.

Damages

[95] The plaintiff has to pay general damages for the breach of contract to the defendant to be assessed by the Senior Assistance Registrar.

[96] However, the amount of general damages assess shall deduct the amount of the outstanding loan, to be calculated up to the date of the termination of the agreement, that is on 11 December 1987.

Cost

[97] Total cost of RM100,000 to be paid by the plaintiff to the defendant.